IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

Civil Revision No. 155 of 2006.

Date of Decision: 24th August , 2007.

Ravi Kant and another. .....Petitioners.

Versus

Ram Kishan and others. .....Respondents.

Coram

The Hon'ble Mr. Justice V.K. Gupta, Chief Justice.

Whether approved for reporting?[1] Yes.

For the Petitioners: Mr. G.D. Verma, Senior Advocate, with Mr. Romesh Verma, Advocate.

For the Respondents: Mr. Ajay Sharma, Advocate, for respondent No.9.

V.K. Gupta, C. J. (Oral):

In the impugned order dated 30th June, 2006 passed by the learned Civil Judge (Senior Division), Hamirpur, the application of the petitioners filed under Order 20 Rule 18 had been practically rejected even though a direction indeed had been issued in the operative part of the Order for sending of the preliminary decree sheet and the

[1] Whether Reporters of Local Papers may be allowed to see the judgment?

jamabandis etc. to the Collector for effecting partition of the property in question. Let us notice the facts first.

A suit for possession by way of partition was filed by the petitioners in the Court of Civil Judge (Senior Division), Hamirpur, being Civil Suit No.53 of 1996. Out of many Issues which were framed in the said suit, Issue No.1 alone was relevant for determining and adjudicating upon the contentious and rival claims of the parties in the suit. Issue No.1 reads thus:-

> "1. Whether the plaintiffs are entitled to decree for possession by way of partition of abadi land in suit to the extent of half share as prayed for? OPP."

The suit was disposed of vide judgment dated 12th May, 2004. Finding on Issue No.1 went in favour of the petitioners-plaintiffs. It was recorded as under:-

> "11. Since plaintiffs are co-sharers to the extent of half share in the total suit property as per the jamabandi Ex.P.1, therefore, plaintiffs are hereby entitled to get the preliminary decree of the partition of their half share. It is made clear that plaintiffs would get physical possession of half share, at the time of implementation of the preliminary decree on the spot. Hence, for the aforesaid reasons, this issue is decided in favour of the plaintiffs."

Ultimately the suit was decreed in the following manner:-

> "19. For the reasons recorded hereinabove while discussing abovesaid issues, the suit for partition is hereby decreed to the effect that a preliminary decree of partition of the Abadi as well as vacant land entered in khata No.460, Khatoni No.549, 550, khasra Nos.1789/1396 min, and 1789/1396 min, total area measuring 1 kanal 13 marlas, as per jamabandi for the year 1989-90, situated in Tika Jahu Khurd, Tappa Mewa, Tehsil Bhoranj, District Hamirpur, H.P., is hereby passed in favour of the plaintiffs qua their half share in the suit property. Parties shall bear their own costs. Decree sheet be prepared accordingly. After needful, this file be consigned to the Record Room."

Order 20 Rule 18 of the Code of Civil Procedure reads as under:-

> "**18. Decree in suit for partition of property or separate possession of a share therein.-** Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,-
>
> (1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such

declaration and with the provisions of section 54;

(2) if and in so far as such decree relates to any other immoveable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required."

Order 26 Rules 13 and 14 read thus:-

"**13. Commission to make partition of immovable property.-** Where a preliminary decree for partition has been passed, the court may, in any case not provided for by section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree.

14. Procedure of Commissioner.- (1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share

of each party and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to the court; and the court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied; but where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit."

Section 54 of the Code of Civil Procedure which relates to the partitioning of the estate or separation of shares clearly stipulates that where a decree in a suit is for the partition of an undivided estate assessed to land revenue, the partition shall be made by the collector or any gazetted subordinate to the Collector deputed by him in this behalf etc. etc. This Section reads thus:-

"54. **Partition of estate or separation of share**.- Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Government, or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if

any) for the time being in force relating to the partition, or the separate possession of shares, of such estates."

A combined reading of all the aforesaid provisions contained in the Code of Civil Procedure lead to the following inevitable as well as mandatory and binding conclusions:-

Whenever a Civil Court seized of a Civil Suit for partition disposes of the suit in favour of the plaintiff by holding that the property forming the subject matter of the suit is required to be partitioned and also determines the share of the plaintiff or the respective shares of the parties in the suit, it shall pass a preliminary decree and, simultaneously, at the same time, also by taking recourse to Order 20 Rule 18 read with Order 26 Rule 13 of the Code of Civil Procedure, in the same judgment, issue a direction for effecting partition in accordance with the judgment and resultantly the partition shall be effected and carried out by issuing a commission (refer to Order 26 Rule 13) this (issuance of Commission) being subject to the condition that if the decree relates to an estate assessed to the payment of land revenue to the Government, the partition or separation of shares has to be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf. Since in this case the property was subject to payment of

land revenue to the Government, a combined reading of Order 20 Rule 18(1) and Order 26 Rule 13 clearly suggests that the learned Civil Judge (Senior Division), Hamirpur in the judgment and decree dated 12th May, 2004 ought to have, simultaneously, there and then, also issued a direction for issuance of a commission in the sense of ordering the Collector or the gazetted subordinate of the Collector to carry out the partition in accordance with the judgment. The learned Civil Judge (Senior Division), Hamirpur did not do so. That was a patent omission and a failure on his part which he ought not have done.

The omission was sought to be rectified by the petitioners by filing the aforesaid application which led to the passing of the impugned order dated 30th June, 2006. The learned Court by making the following observations in the course of the impugned order has clearly misdirected itself by taking a wrong view that the issue of effecting the partition lies with the domain and province of the Collector. In other words the learned Court below has taken a view that once a preliminary decree is passed, the Civil Court is not seized of the matter and the act of partitioning the property is in the domain and the province of the Collector only. The observations are apposite and I quote:-

> "A combined reading of these two provisions would show that civil Court is only competent to declare the share of the persons and the actual

> partition of the person is to be made by the Collector or any gazetted subordinate of the Collector. Hence, it is not possible to pass final decree in the present case and the actual partition is to be made by the Collector. It was submitted that the abadi is to be demolished for delivering the share of the land to the applicant, therefore, only this Court would be competent to pass a decree, but that cannot be accepted. The actual partition or how it is to be carried out is within the province of the jurisdiction of the Collector and is to be decided by him. The civil Court is only to declare the rights which have been declared."

Nothing could be farther from the correct and applicable statutory position as has been enumerated above in this judgment, by an explicit and specific reference to the aforesaid provision contained in the Code of Civil Procedure. Actually if one looks at Rule 14 of Order 26, especially sub rule (3) thereof it clearly emerges that after a preliminary decree is passed by a Civil Court and the act of actual partitioning in consequence thereof is effected by issuing a commission under Rule 13 of Order 26, of course this being subject to rule 18(1) of Order 20 read with Section 54 of the Code of Civil Procedure, the report of either the Collector or the Commissioner as the case may be has to be received by the Court in terms of sub rule (3) of Rule 14 (supra) and either by way of confirmation of the report or it being varied,

a decree in accordance therewith has to be passed by the Civil Court. This is what is called in common parlance the final decree.

To sum up, what, therefore, emerges is that the Civil Court which passes a preliminary decree in a suit for partition continues to retain with itself the control and seisin of the suit till it passes the final decree in the same suit based upon the report of the Collector or the Commissioner, as the case may be. To that extent also the learned Court below completely misdirected itself because even though it did, in the ultimate para of the impugned order directed that a copy of the preliminary decree sheet and the jamabandi be sent to the Collector, it did not order the Collector in turn to send its report to the Court so as to enable the Court to pass the final decree in the suit based upon or in accordance with the report of the Commissioner, either by confirming the same or upon its variation.

For the aforesaid reasons, the impugned order is set aside. To do complete justice between the parties and to perfectly follow all the aforesaid statutory provisions, in a correct manner, it is directed that the learned Court below shall send the matter to the Collector with directions to him to effect the partition either himself or through his gazetted subordinate in accordance with the mandate contained in the judgment and decree passed by it on 12th May, 2004 in

Civil Suit No.53/1996 and thereafter to send report to it in accordance with law.

The parties through their learned counsel are directed to appear in the trial Court on 9th October, 2007.

The petition is disposed of.

24th August, 2007. (V.K. Gupta), C.J.
(tr)